WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
APRIL 2013

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Dane
Milwaukee
Outagamie
Sheboygan
Vilas
Walworth

WEDNESDAY, APRIL 10, 2013

9:45 a.m.	{12AP805	-	Scott N. Waller v. American Transmission Company, LLC
	{12AP840	-	Scott N. Waller v. American Transmission Company, LLC
10:45 a.m.	{10AP2363-CR	-	State v. Richard Lavon Deadwiller
	{10AP2364-CR	-	State v. Richard Lavon Deadwiller
1:30 p.m.	11AP2916-CR	-	State v. Andrew M. Edler

THURSDAY, APRIL 11, 2013

9:45 a.m.	12AP500	-	Dane County v. Sheila W.
10:45 a.m.	11AP1451	-	Amjad T. Tufail v. Midwest Hospitality, LLC

TUESDAY, APRIL 23, 2013

9:45 a.m.	11AP2760-D	-	Office of Lawyer Regulation v. Daniel W. Johns, Jr.
10:45 a.m.	11AP1566	-	United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 10, 2013
9:45 a.m.

In this bypass of the District II Court of Appeals (headquartered in Waukesha), the Supreme Court reviews a decision by Walworth County Circuit Court, Judge James L. Carlson, presiding. A party may ask the Supreme Court to take jurisdiction of an appeal or other pending Court of Appeals' proceeding by filing a petition to bypass pursuant to sec. (Rule) 809.60, Stats. A matter appropriate for bypass usually meets one or more of the criteria for review, sec. (Rule) 809.62(1), Stats., and one the Court feels it will ultimately choose to consider regardless of how the Court of Appeals might decide the issues.

2012AP805/840 Waller v. American Transmission Co.

This bypass involves two prior Court of Appeals' decisions and three circuit court decisions arising from a dispute over the condemnation of property for the location of an electrical transmission line project in Walworth County. The Supreme Court examines Wis. Stat. § 32.06(3m), the uneconomic remnant statute.

Some background: Under section 32.06(3m), "uneconomic remnant" means the property remaining after a partial taking of property, if the property remaining is of such size, shape or condition as to be of little value or of substantially impaired economic viability. If acquisition of only part of a property would leave its owner with an uneconomic remnant, the condemnor shall offer to acquire the remnant concurrently and may acquire it by purchase or by condemnation if the owner consents.

Scott N. Waller and Lynnea S. Waller owned property along the path of a power transmission line that was being upgraded near the crossing of Interstate 43 over Mound Road just outside Delavan. The transmission line project began with administrative proceedings before the Public Service Commission (PSC) and the Department of Natural Resources (DNR), both of which must review and approve all aspects of certain high-voltage projects.

The PSC considered the safety and public health implications of the proposed transmission line, including its distance from houses and other buildings and the associated electromagnetic fields at various distances from the line. Scott Waller testified before the PSC about his concerns that the proposed line would be too close to his house, might create a health hazard, and could impair his property value.

The PSC issued a certificate of public convenience and necessity (CPCN). The PSC found that the transmission line would promote the reliability of the electrical grid and would not have an undue adverse impact on public health and welfare.

American Transmission Co. (ATC) then set out to acquire the real estate interest needed to proceed with the line, including an easement along Wallers property. When negotiations to purchase the easement and the whole property failed, ATC made a jurisdictional offer of $99,500 on March 20, 2008, to acquire a 45-foot wide easement along two sides of the Wallers' 1.5-acre property. The Wallers rejected the offer.

Three lawsuits resulted from ATC's jurisdictional offer:

- A right-to-take action (Case No. 08-CV-520—the "right-to-take case") under Wis. Stat. § 32.06(5), asserting the taking would leave an uneconomic remnant;

- An action commenced by ATC to determine just compensation under Wis. Stat. § 32.06(7) (Case No. 08-CV-955 – the "valuation case"); and
- A relocation benefits case under Wis. Stat. § 32.20 (Case No. 10-CV-69 – the "relocation case"), claiming that ATC's taking of the easement forced the Wallers to move and required compensation.

The bypass petition filed by ATC arises out of final judgments and orders entered in the right-to-take case and the relocation case. The appeals also implicate the valuation case, though neither party appealed the jury verdict in Walworth County Circuit Court Case No. 08-CV-955, assigning $38,000 in value to the property after the taking of the easement.

The petition raises the following issues:

1. How must a landowner raise a claim that a condemnor has taken too *little* property, leaving the landowner with an uneconomic remnant: In a valuation proceeding, in an inverse condemnation action, or in a right-to-take action?
2. Did the circuit court properly interpret and apply the uneconomic remnant statute, Wis. Stat. § 32.06(3m)?
3. May a landowner recover litigation expenses for obtaining a judicial ruling that the property that remains after a taking in an uneconomic remnant?
4. Is a landowner who voluntarily moves from a property because of personal preferences nonetheless "displaced," entitling the landowner to relocation benefits under Wis. Stat. § 32.19?

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 10, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Patricia D. McMahon, presiding.

2010AP2363/2364-CR State v. Deadwiller

The issue raised in this sexual assault case is whether the U.S. Supreme Court's recent decision in Williams v. Illinois, 567 U.S.___, 132 S. Ct. 2221 (2012) is binding upon Wisconsin courts. The Supreme Court is asked to review whether the Court of Appeals erred in affirming two convictions against Richard Deadwiller for second-degree sexual assault with the use of force.

Some background: Deadwiller was charged with forcibly assaulting two women, both of whom testified at trial that the he had raped them. Deadwiller testified at trial that he had consensual sex with the women. He did not dispute that semen recovered from both women's bodies was his.

A jury found Deadwiller guilty of both sexual assaults. He was sentenced to consecutive terms of 15 years of initial confinement and five years of extended supervision. Deadwiller appealed, arguing that he may not have testified had the trial court not allowed a state crime lab technician to rely on DNA analysis and reports by Orchid Cellmark, a company that runs a DNA testing lab in Texas. Deadwiller argued reliance on Orchid Cellmark's DNA reports violated his constitutional right to confrontation.

A state Crime Lab analyst testified at trial that Orchid Cellmark analyzed semen samples taken from the two victims and produced DNA profile reports. The Orchid Cellmark profiles matched Deadwiller's profile stored in a DNA databank. This initial match prompted the state Crime Lab to obtain a fresh DNA sample from Deadwiller. The state Crime Lab analyst testified that he compared the fresh sample to the semen DNA taken from the victims and in his opinion Deadwiller was the source of the semen found in both victims.

The Court of Appeals held Deadwiller's appeal in abeyance pending the U.S. Supreme Court's decision in Williams. The Court of Appeals noted that Williams determined that reports like the one issued by Orchid Cellmark are not testimonial and may be relied on by a testifying expert without violating a defendant's right to confrontation, even though the person who prepared the report does not testify at trial. Consequently, the Court of Appeals affirmed.

The Court of Appeals said the confrontation right applies to statements that are "testimonial." See Davis v. Washington, 547 U.S. 813, 821 (2006); Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

Deadwiller argued that Orchid Cellmark's report was testimonial and that the trial court should not have allowed the state Crime Lab technician to rely on it in giving his opinion that the defendant was the source of the DNA taken from the women.

The Court of Appeals said the conclusion that the outside laboratory's report was not testimonial governed this appeal, and there was no need to analyze whether the outside laboratory's report was or was not relied on for its truth or whether the Williams court's analysis might have been different if the trial had been to a jury rather than to a judge.

Deadwiller argues that Orchid Cellmark's DNA profile results were clearly testimonial because the state needed those results in order to prove or establish the identity of the perpetrator. He argues the Court of Appeals erred in finding Williams controlling.

He argues that this case is materially different because Williams dealt with the applicability of an Illinois state rule of evidence; Illinois did not request substantive admissibility of the Texas lab results and material; and the Williams court deemed it important that the trial was to a judge rather than a jury because a judge is less likely to be confused as to legal matters.

The state says the Court of Appeals correctly decided that the narrow holding in Williams – that the outside laboratory DNA profile is not "testimonial" – is binding on Wisconsin courts and, as a result, that the defendant's confrontation clause rights were not violated.

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 10, 2013
1:30 p.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Sheboygan County Circuit Court, Judge Terence T. Bourke, presiding.

2011AP2916-CR State v. Edler

This certification from the District II Court of Appeals examines an arson suspect's right to counsel and whether Wisconsin law affords a different level of protection under Miranda v. Arizona, 384 U.S. 436 (1966) warnings than has developed under federal case law.

More specifically, the Court of Appeals asks the Wisconsin Supreme Court:

1) Should Wisconsin follow Maryland v. Shatzer, ___ U.S. ___, 130 S. Ct. 1213 (2010), which held that the Edwards v. Arizona, 451 U.S. 477 (1981) prohibition against seeking a waiver of the Miranda warnings and reinitiating police interrogation no longer applies when there has been a 14-day break in custody, or does the Wisconsin Constitution provide a greater level of protection to individuals suspected of committing a crime?
2) When the defendant asked, in the squad car on the way to the second interrogation, "Can my attorney be present for this?", did he unambiguously invoke his right to counsel?
3) If the statement set forth in the second issue is declared to be ambiguous, does it make a difference whether the ambiguous statement was made before or after Miranda warnings were given?

Some background: In early 2011, the defendant, Andrew Edler, was 17 years old and one of the newest firefighters in the Waldo Fire Department. In January and March 2011, two small arson fires occurred in the area, and Edler fell under suspicion because he arrived so quickly at the scene of those two fires. On March 30, while interrogating Edler about an unrelated burglary case, Detective Gerald Urban began asking Edler about the arsons and his possible involvement. Shortly after the subject of the arsons came up, Edler said, "From this point on, I'd like a lawyer here."

Urban immediately ceased questioning. Edler was booked and jailed pending appearance on criminal charges in the burglary case. Soon after his initial appearance in that case on April 1, 2011, Edler was released on bond, and a public defender was appointed as his lawyer on April 4, 2011.

Later in April, an acquaintance of Edler agreed to Urban's request to secretly record a conversation with Edler about the arsons. That conversation was recorded on April 18, 2011. On April 20, Edler was arrested on the arson charges at his family home. Edler's father asked what Edler was being accused of, and Urban told him about the arson charges, emphasizing that Edler's cooperation in the investigation was important.

As Edler sat in the squad car, Edler's father admonished him to cooperate with the investigators and tell the truth. On the ride to the station, Urban sat beside Edler in the back seat of the squad and advised him continually that he should take his father's advice, cooperate, tell the truth, and help himself out. At some point during the ride, Edler asked Urban, "can my attorney be present for this?" and Urban answered, "yes he can."

Upon arrival at the sheriff's department, Edler was placed in an interview room to wait for questioning. He was crying and having some difficulty breathing as Urban entered and began telling him about the strong case the sheriff's department had developed against him. Urban emphasized that the evidence already was sufficient for convictions.

Urban then began to read Edler the Miranda warnings. When he read, "you have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning," Edler asked "…if I request a lawyer does that mean you still have to bring me into custody and I have to go sit in the jail?" Urban explained that the presence of a lawyer would have no effect on the fact that Edler was now in custody. Urban then reread all of the Miranda rights from the beginning. At the end, when Urban asked, "realizing that you have these rights, are you now willing to answer questions?" Edler answered affirmatively. In the subsequent interrogation, Edler admitted involvement in the arsons.

Edler moved for suppression of the admissions made during the April 20 interrogation at the sheriff's department, arguing that his Fifth Amendment right to counsel had been violated. The circuit court held that Edler's statement in the car ("Can my lawyer be present for this?") was an unequivocal invocation of his right to counsel and suppressed statements that Edler made thereafter.

The state appealed. It argued that because there had been more than a 14-day break in custody from Edler's initial request for counsel on March 30, the detective was free, pursuant to Shatzer, to approach Edler, read him his Miranda rights, and ask if he was now willing to talk with the detective about the arsons. The state further argued that Edler's utterance in the car on the way to the sheriff's department ("Can my lawyer be present for this?") was a question and not an unequivocal invocation of his right to counsel.

Edler argued in response that the interrogation on April 20 was barred by both his March 30 and April 20 requests for counsel. He claimed that Shatzer did not apply to the facts of his case and that, in any event, the Wisconsin Constitution should provide broader protections for accused individuals in line with Justice Stevens' dissent in Shatzer. He also argued that his statement in the squad car was a legally sufficient invocation of his right to counsel, such that the detective was obligated to cease any further interrogation in the absence of Edler's attorney.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 11, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which dismissed an appeal of a Dane County Circuit Court decision, Judge C. William Foust, presiding.

2012AP500 Dane County v. Sheila W.

This case involves review of a circuit court order appointing a temporary guardian for a teenage minor to consent to certain medical treatment over the objections of the minor and the minor's parents. Because the temporary guardianship order expired while the case was pending before the Court of Appeals, that court dismissed the appeal as moot. The issues presented to the Supreme Court are as follows:

1) Does Wisconsin recognize the "mature minor doctrine," a common law rule providing that a minor may consent or refuse consent to medical treatment upon a showing of maturity, intelligence and sufficient understanding of the medical condition and treatment alternatives?
2) Does Wisconsin recognize a mature adolescent's due process right to refuse unwanted medical treatment?
3) Did the circuit court violate an adolescent's common law and constitutional right to refuse medical treatment when it appointed a temporary guardian to consent to treatment over the adolescent's objection?
4) Should the exceptions to the mootness doctrine be utilized to address the above issues despite the expiration of the temporary guardianship?

WISCONSIN SUPREME COURT
THURSDAY, APRIL 11, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge William S. Pocan, presiding.

2011AP1451 Tufail v. Midwest Hospitality

This case involves a question of contract interpretation. The Supreme Court reviews a Court of Appeals' decision regarding a lease dispute between a property owner and restaurant franchisee owner in Milwaukee.

Some background: Amjad T. Tufail operated a "New York Chicken" restaurant under a special use permit granted by the city of Milwaukee Board of Zoning Appeals in November 2000. Tufail was permitted to operate his business in compliance with a submitted plan of operation which included a drive-through and being open until 4 a.m., seven days a week. The special use was granted for 10 years.

In March 2008, Midwest Hospitality leased the restaurant building from Tufail for five years, beginning on April 1, 2008 to operate a Church's Chicken franchise. The lease required Midwest Hospitality to pay rent of $35,000 for the first year to be paid in equal monthly installments.

The lease included the following warranty: "Landlord represents and warrants to Tenant that: (g) no existing restrictions, building and zoning ordinances, or other laws or requirements of any governmental authority prevent the use of the Premises for the purposes set forth in Paragraph 5."

Paragraph 5 reads as follows:

> "Tenant may use and occupy the Premises for any lawful purposes, including, but not limited to, the retail sales, consumption, and delivery of food and beverages which shall include, but not be limited to, Chicken products, Fish products, bread products, salads, sandwiches, dessert items, promotional items, and any other items sold by any Church's Chicken store."

After Midwest Hospitality began occupying the premises, in May 2008 they learned that they had to obtain a special-use permit to operate the restaurant with a drive-through. The special-use permit was eventually granted with restrictions, including closing of the restaurant by 9 p.m.

Midwest Hospitality stopped paying rent, stating that it was not responsible for the lease payments because Tufail failed to inform it that a special-use permit would be required and that the lease was, as a result, terminated. The circuit court determined that Tufail had not breached the warranty.

The trial court found that the special use permit was required because of the drive-through request. The trial court focused on the drive-through as the reason requiring the special use permit and that the lease did not warrant an unrestricted ability to operate a drive-through. It did not address whether a special-use permit was required for any other reason.

The Court of Appeals reversed, concluding that the warranty was breached.

Midwest Hospitality argued to the Court of Appeals that its desire to have a drive-through has no bearing on whether a special-use permit was required or Tufail's representation that there were no zoning restrictions for use of the building as a Church's Chicken. It argues that the trial court ignored undisputed evidence that a free standing, fast-food restaurant was not permitted under the existing zoning regulation, regardless of a drive-through.

Tufail contends the Court of Appeals' decision is inconsistent with standard principles of contract interpretation because it "greatly expands the scope of the warranty beyond the language in the lease."

Tufail says that a special-use permit was only required to operate the property as a fast-food/carryout restaurant with a drive through, which was not the use specifically written into the lease. He contends Midwest Hospitality was free to operate a sit-down restaurant at the premises without a special-use permit.

Tufail says he was left without any Lease payments and was left with a property in a state of complete disrepair.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 23, 2013
9:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Vilas County.

2011AP2760-D Office of Lawyer Regulation (OLR) v. Daniel W. Johns, Jr.

In this case, the Supreme Court reviews whether Atty. Daniel W. Johns, Jr. violated Supreme Court Rules of professional conduct for attorneys, and if so, the appropriate penalty.

A referee concluded that Johns did not violate SCR 20:8.4(b) when he was convicted on one felony count of homicide while driving with a prohibited blood-alcohol content, but that he did violate SCR 21.15(5) when he failed within five days to notify the clerk of the Supreme Court and the OLR in writing of his 2004 conviction.

The OLR appeals the referee's conclusion and recommendation for either a private or public reprimand. The OLR contends Johns violated SCR 20:8.4(b), which provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; . . ." The OLR contends Johns also failed to timely notify the OLR and clerk of Supreme Court in writing of his conviction.

Some background: Johns graduated from Marquette University Law School in 1999 and had no prior disciplinary history. The incident that led to his conviction occurred shortly before 1 a.m. on Dec. 28, 2002, when Johns was 29 years old. Johns had met with family members for dinner at a restaurant to celebrate the holidays. After dinner, Johns and his brother stayed at the restaurant bar with some friends until it closed. After leaving, Johns lost control of the truck he was driving and struck a tree. Johns' brother was partially ejected from the truck; his head hit the tree, causing fatal injuries.

A blood draw following the accident showed that Johns had a blood alcohol content of 0.257 percent. Johns was arrested and, after being read his Miranda warnings, declined to answer any questions and invoked his right to counsel.

On June 10, 2004, Johns pled guilty and was convicted on one felony count of homicide by use of a motor vehicle while driving with a prohibited blood-alcohol content. Before the court accepted Johns' plea, there was some confusion amongst the parties and the court as to whether a conviction on this count would result in an automatic revocation of Johns' law license. The trial court ordered a recess and directed the prosecutor, defense counsel, and Johns to phone the OLR and get an answer to this question. They did so in an off-the-record phone conversation.

Back on the record, Johns' lawyer stated that they had talked to the deputy director of the OLR, who advised that there is no provision in the ethics code that would call for an automatic revocation or suspension of Johns' law license based upon the conviction. Rather, any action by the OLR would be dependent upon the facts and circumstances of Johns' conduct.

The trial court sentenced Johns to 120 days in jail and five years of probation. Johns served his jail time and was released on probation. He was released early from probation – on May 17, 2007 – based on the recommendation of his probation agent and the trial court judge.

Johns began practicing law again and is currently a full-time solo practitioner in Vilas County. Johns also performs various community service work, including regularly speaking to juveniles at the Lincoln Hill Juvenile Correctional Facility about his personal history.

On Nov. 30, 2011, the OLR filed the underlying complaint. In response, Johns denied that his conduct resulting in his 2004 conviction reflected adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects so as to violate SCR 20:8.4(b). Johns also denied that he had committed misconduct under SCR 21.15(5); he admitted that he did not provide timely written notice of the felony conviction to the OLR and to the clerk of the Supreme Court, but explained that he and his lawyer spoke with the OLR on the date of the conviction regarding the possible impact of the conviction on his law license.

In the referee's report and recommendation to this court, the referee concluded that Johns did not violate SCR 20:8.4(b), but did violate SCR 21:15(5). The referee recommended that the court impose either a private or a public reprimand.

The OLR appeals to the Supreme Court, contending, among other things, that the referee's recommendation is inconsistent with Wisconsin and other states' case law on attorney discipline for vehicular homicide. The OLR also contends that the referee should not have admitted letters from juveniles at the Lincoln Hill Juvenile Correctional Facility as character references for Johns. OLR has asked for a 60-day suspension of Johns' license to practice law.

A decision by the Supreme Court also is expected determine who will pay costs of the prosecution.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 23, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which reversed a Outagamie County Circuit Court decision, John A. Des Jardins, presiding.

2011AP1566 United Concrete & Construction v. Red-D-Mix Concrete

This case examines who (judge as a matter of law or jury as a matter of fact) determines whether a representation made by a seller of a product is mere "puffery" or is legally sufficient to support a misrepresentation claim, including one brought under Wis. Stat. § 100.18. "Puffery" is defined as the expression of an exaggerated opinion, as opposed to a factual representation, regarding the quality of a good or service that cannot be proven true or false and is intended to sell the product or service.

Some background: Defendant Red-D-Mix is a maker and distributor of concrete. Plaintiff United Concrete & Construction, Inc. (United) is a concrete contractor that contracts with end-users for the installation of concrete "flatwork," such as patios and driveways. United had used Red-D-Mix as a supplier for several years, including 2002 and 2003. United says it then switched to another supplier after it experienced pitting, scaling and crumbling of the concrete it installed due to Red-D-Mix's concrete containing excessive amounts of "bleed water." Bleed water emerges from the concrete after it is poured and water is forced up as sand and aggregate settles downward.

After allegedly receiving assurances from a Red-D-Mix sales representative that the bleed-water problem had been resolved, United decided to resume purchasing concrete from Red-D-Mix for the 2007 season. United claims that it once again suffered from the same excessive bleed water problems.

Customers began to complain about the problems to United. Red-D-Mix claims that only a few customers actually complained and that United unilaterally decided to approach all of its customers even if they had not complained.

United advised its 2007 customers that the problems with their patios or driveways resulted from defective concrete supplied by Red-D-Mix and that United intended to pursue legal action against Red-D-Mix. United told its customers that it would attempt to obtain damages from Red-D-Mix and that it would allocate any money received among those individuals who had signed Assignment of Rights to Sue, which purported to assign the customers' rights against Red-D-Mix to United. A portion of United's customers signed and returned the assignment documents.

Red-D-Mix asserts that the assignment was, in reality, a release of claims against United, which means that United will not be liable for any damages related to fixing or replacing those customers' concrete work.

In 2008, United did file suit against Red-D-Mix and two of its insurers in Outagamie County Circuit Court. Its most recent complaint alleged claims for breach of contract, breach of express and implied warranties, negligence, indemnification, contribution, and violation of Wis. Stat. § 100.18. Red-D-Mix moved for summary judgment on all claims, which the circuit court granted.

The Court of Appeals reversed and remanded for further proceedings. The Court of Appeals rejected the circuit court's conclusion that United's claim under Wis. Stat. § 100.18 was defective because, as a matter of law, all of the misrepresentations alleged in United's complaint were mere puffery. It held that the question of whether the alleged misrepresentations constituted puffery was a question of fact to be decided by the jury at trial, not a question of law to be decided by the court.

The Court of Appeals also ruled that United could proceed with its contract claims against Red-D-Mix, concluding that United had produced sufficient evidence of its damages and that the Assignments signed by United's customers did not strip United of its right to sue Red-D-Mix or protect it from the claims of its customers.

Red-D-Mix seeks Supreme Court review of the issue of whether the court or the jury should determine whether a defendant's alleged misrepresentations are mere puffery. It also asks the Supreme Court to review whether its decision in Linden v. Cascade Stone Co., 2005 WI 113, 283 Wis. 2d 606, 639 N.W.2d 189, precludes a contractor from attempting to obtain its customers' claims against a subcontractor through an assignment and from then suing the subcontractor on those customer claims.